



Litigation Update

Litigation Section News

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Orgasm “Merely A Physiological Reaction To Physical Stimulation” Testimony Properly Received In Child Molest Case.

Defendant was convicted of molesting his step-daughter while his wife was out of the country. The victim said defendant has a bad temper and kept guns in the house, and she was afraid he would get angry if she refused. She said that although she experienced orgasms when he orally copulated her, she received no enjoyment. A prosecution expert testified an orgasm was merely a physiological reaction to physical stimulation. When asked if this meant a child could experience an orgasm while being sexually abused, the expert answered yes. On appeal, defendant claimed the expert was not qualified to give such testimony. In affirming defendant's conviction, the appellate court said the expert was the clinical supervisor of a university-affiliated sexual assault treatment center and a specialist in the treatment of adolescent female sexual assault victims, and the trial court did not err by ruling the expert was qualified to offer that testimony. (*People v. Austin* (Cal. App. Second Dist., Div. 3; September 12, 2013) 219 Cal.App.4th 731.)

There's A Difference Between A Rebuttable Presumption And The Burden Of Producing Evidence.

Decedent committed suicide 25 days after writing his will leaving his estate to his various children, grandchildren and one other child of a previous wife. Decedent had possession of his original will, but no one could find it after his death. Several of the children filed petitions to probate a copy of the will, but decedent's estranged wife filed a will contest, alleging decedent revoked his will by destroying it. Under intestate succession, the estranged wife would receive 100 percent of the couple's community property as well as one-third of his separate property because they were still married when he died. *Probate*

Code section 6124 provides that a testator is presumed to have destroyed a will with an intent to revoke it if the will was last in the testator's possession. The trial court ruled the children's evidence was not substantial enough to rebut the presumption. In reversing, the appellate court explained the difference between the burden of proof and the burden of producing evidence, and said the children could overcome the presumption by introducing substantial evidence tending to contradict the assumption the decedent destroyed his will with the intent to revoke it. The appeals court stated: “The trial court expressly declared in its statement of decision that it ‘weighed the evidence and credibility of the witnesses’ in finding the evidence ‘not substantial enough’ to overcome the revocation presumption, primarily because the court believed [the estranged wife's] claim she did not destroy the will. Thus, the court evaluated whether [the children's] evidence persuaded it that [decedent] did not destroy his will, rather than focusing on whether his evidence constituted substantial evidence negating the revocation presumption.” (*Estate of Satish Trikha, Deceased* (Cal. App. Fourth Dist., Div. 3; September 13, 2013) 219 Cal. App.4th 791.)

Meaning Of “Physical Contact” In An Insurance Policy's “Assault Or Battery” Exclusion.

A nightclub dancer suffered severe injuries shortly after she completed her shift when a patron of the nightclub threw flammable liquid on her and then set her on fire. The man was convicted of aggravated mayhem and torture. In the underlying action, the woman sued her employer for inadequate security; it was resolved by a stipulated judgment in the amount of \$10 million. While the underlying action was pending, the employer's insurer brought another action, the instant one, for declaratory relief, alleging it had no duty under the policy to pay any

damages. The insurer relies on the “Assault or Battery” exclusion in the liability policy issued to the employer. That endorsement excluded coverage for “all ‘bodily injury’ . . . arising out of ‘assault’ or ‘battery’ . . . including but not limited to ‘assault’ or ‘battery’ arising out of or caused in whole or in part by negligence . . . [¶] ‘Battery’ means negligent or intentional wrongful physical contact with another without consent that results in physical or emotional injury.” The trial court granted summary judgment in favor of the insurer. In affirming, the appellate court rejected plaintiff's argument that body-to-body contact was required and concluded a battery “includes a striking or touching as occurred in this case.” (*Mount Vernon Fire Insurance Corporation v. Oxnard Hospitality Enterprise, Inc.* (Cal. App. Second Dist., Div. 5; September 16, 2013) 219 Cal.App.4th 876.)

Plaintiff Passes Anti-SLAPP Hurdle For Torts Of Public Disclosure Of Private Fact, IED & False Promise.

For a documentary, plaintiff, a police informant, provided an inside glimpse into a notorious street gang. He claims he agreed to speak on camera on condition his face would be concealed, and that he wore a hat and bandana to cover his face. He says the producer told him he didn't need the disguise since the production process would conceal his face. When the episode was aired, plaintiff's identity was not concealed. Defendant contends plaintiff signed a release waiving all claims against anyone associated with the program and allowing his real name and identity to be used. But plaintiff says the producer asked him to sign a receipt for his \$300 payment, and that he is illiterate and dyslexic. The federal district court granted defendants' anti-SLAPP motion to strike under *Code of Civil Procedure* section 425.16. The Ninth Circuit reversed and remanded, stating plaintiff met his burden of showing a probability of pre-

vailing on the merits. (*John Doe v. Gangland Productions, Inc., A&E Television Networks* (Ninth Cir.; September 16, 2013) (Case No. 11-56325).)

Within The Scope Of Employment. An employee of an insurance broker was required to use her personal vehicle to visit prospective clients, make presentations, provide educational seminars, follow leads, and transport company materials. On the day of an accident, at the end of the workday, she decided she would stop for some frozen yogurt and take a yoga class. As she made a left turn into the yogurt shop, she collided with a motorcyclist. The motorcyclist filed an action against the employee and her employer, and the trial court granted summary judgment in favor of the employer on the ground the employee was not acting within the scope of her employment when she made that left turn. The appellate court reversed, stating: "Because the employer required the employee to use her personal vehicle to travel to and from the office and make other work-related trips during the day, the employee was acting within the scope of her employment when she was commuting to and from work. The planned stops for frozen yogurt and a yoga class on the way home did not change the incidental benefit to the employer of having the employee use her personal vehicle to travel to and from the office and other destinations." (*Moradi v. Marsh USA, Inc.* (Cal. App. Second Dist., Div. 1; September 17, 2013) 219 Cal.App.4th 886.)

Membership in the ADR Subcommittee

The Litigation Section ADR Subcommittee, which is comprised of both ADR professionals and advocates, focuses on recent case law and legislative developments in the field of alternative dispute resolution. The ADR Subcommittee also provides educational programs on ADR issues. Members of the Litigation Section who wish to join the ADR Subcommittee should send an e-mail and resume to the co-chairs of the Committee: Jeff Dasteel (Jeffrey.dasteel@gmail.com) and Don Fischer (donald.fischer@fresno.edu).

Watch Out For That...Ugh. A deputy sheriff pulled over a motorist for a traffic violation. As part of the traffic stop, the officer opened his driver side door to exit his police vehicle. As he opened his door, a motorcyclist, who had seen the patrol car's overhead lights two or three blocks earlier, collided with the door of the patrol car. Under *Vehicle Code* section 17004, a peace officer in "immediate pursuit of an actual or suspected violator of the law" enjoys immunity for his actions. Both the trial and the appellate court held section 17004 applies here. (*Moreno v. Quemuel* (Cal. App. Second Dist., Div. 2; September 17, 2013) 219 Cal. App.4th 914, [162 Cal.Rptr.3d 219].)

No Unemployment Payments When Wages Earned As Independent Contractor. Plaintiff is an attorney who left private practice in 2007 to work as a law clerk at the superior court. He lost his job at the superior court due to the economic recession and was unable to find employment either in the public or private sector. He filed a claim for unemployment benefits. His benefits commenced on April 4, 2010, with a weekly benefit amount of \$450. He disclosed to EDD [Employment Development Department] that he intended to seek work as an independent contractor while receiving benefits. He expended \$10,925.23 in setting up a business in his home, and earned \$2,750 for the week ending May 8, 2010. However, he did not report any wages earned that week, taking the position his business expenses had exceeded his earnings. EDD denied him benefits for that week. The superior court denied his petition for administrative mandate. The Court of Appeal considered *Unemployment Insurance Code* sections 1252 and 1279, and stated the issue before it as: "The dispute in this case involves the meaning of the term 'wages' in the relevant statutes as that term is applied to those self-employed or independent contractors." The appellate court concluded: "[T]he wages of a self-employed person or independent contractor include 'any and all compensation' that the individual receives in a given week." The court also found "even if certain of the expenses were deductible for the purpose of determining [his] income, [he] failed to present evidence that those expenses were incurred during the accounting period in

question: specifically, the week ending May 8, 2010." (*Natkin v. California Unemployment Insurance Appeals Board* (Cal. App. Second Dist., Div. 2; September 18, 2013) 219 Cal.App.4th 997.)

A Judgment Debtor Uncooperative? How Unusual. A judgment debtor doesn't answer most of the questions and won't produce the requested documents. Sound familiar? The trial court ordered compliance and the judgment debtor appealed. The creditor convinced the trial court the order was not appealable under *Code of Civil Procedure* section 904.1, and the trial court set an order to show cause re contempt. The judgment debtor petitioned the appellate court for writ relief, contending the order to comply was appealable and therefore the trial court was without jurisdiction to set an OSC while his appeal was pending. The judgment debtor prevailed in the appellate court on his writ. That court decided the trial judge's order was appealable and the lower court, therefore, lacked jurisdiction to set the OSC. (*Macaluso v. Sup. Ct. (Lennar Land Partners II, LLC)* (Cal. App. Fourth Dist., Div. 1; September 18, 2013) 219 Cal.App.4th 1042.)

Plaintiff Alleged Her Home Was Sold While She Was In Compliance With Mortgage Modification Plan; Demurrer Should Not Have Been Sustained. In 2006, plaintiff refinanced her home and executed a promissory note secured by the deed of trust. The deed of trust was later assigned to defendants. A notice of default and election to sell under the deed of trust were executed and recorded. After negotiations, defendant offered plaintiff a modification plan which required her to make three monthly payments as a trial plan, and, if she made those payments, defendants would provide her with a mortgage modification agreement. Plaintiff alleged she complied and defendant mailed her a mortgage modification agreement, which she signed and sent back. She says defendant promised to return to her a signed copy of the agreement, but defendant never sent it. She continued making her monthly payments. At some point, defendant returned one of her checks to her because it was not certified, a requirement not set forth in the modification agreement.

Shortly thereafter, the property was sold at auction, far below market value, despite the fact plaintiff never received a notice of default or notice of trustee sale. After she was forced to move, plaintiff filed an action alleging breach of the mortgage modification agreement and wrongful foreclosure. The trial court sustained defendants' demurrer without leave to amend. The appellate court reversed, stating: "We conclude the homeowner sufficiently alleged equitable estoppel to preclude the lender's reliance on the statute of frauds defense. We also conclude that the homeowner sufficiently alleged a cause of action for wrongful foreclosure." (*Chavez v. Indymac Mortgage Services* (Cal. App. Fourth Dist., Div. 1; September 19, 2013) 219 Cal.App.4th 1052.)

Arbitration Agreement Lacking Specific Provisions About How Arbitration Will Be Conducted Found To Be Enforceable. A trial court denied a petition to compel arbitration, finding there was no valid arbitration agreement because there was no specification about what agency or person would conduct it or how the arbitrator would be selected. The appellate court reversed, stating "because the court has the power to appoint an arbitrator under [*Code of Civil Procedure*] section 1281.6 when the parties fail to agree upon a method for appointment, we conclude that neither the absence of a definite method, nor the presence of "alternative options," for appointing an arbitrator renders an otherwise valid arbitration agreement enforceable." (*HM DG, Inc. v. Etemad and Beizai* (Cal. App. Second Dist., Div. 3; September 20, 2013) 219 Cal. App.4th 1100, [162 Cal.Rptr.3d 412].)

Not In My Back Yard. "One of the wealthiest cities in the United States" passed an ordinance "which prohibits new group homes in most residential areas, requires existing group homes in those areas to submit to a burdensome permit process, and subjects those seeking to establish group homes in the limited areas in which they are permitted to operate to the same onerous permit process." Group homes are "homes in which recovering alcoholics and drug users live communally and mutually support each other's recovery." At the same time, the city did not impose similar regula-

tions on properties rented by homeowners to vacationing tourists, despite the fact that such rental properties may cause similar social problems as group homes. Residents of the group homes and others brought actions against the city alleging discrimination under the federal Fair Housing Act [FHA; 42 U.S.C. § 3613], the Americans With Disabilities Act [ADA; 42 U.S.C. § 12132], California's Fair Employment and Housing Act [FEHA; *Government Code* section 12900, *et seq.*] and the Equal Protection Clause. The federal district court granted summary judgments in favor of the city. The Ninth Circuit reversed, stating: "Where, as here, there is direct or circumstantial evidence that the defendant acted with a discriminatory purpose and has caused harm to members of a protected class, such evidence is sufficient to permit the protected individuals to proceed to trial under a disparate treatment theory." (*Pacific Shores Properties, LLC v. City of Newport Beach* (Ninth Cir.; September 20, 2013) (No. 11-55460, 11-55461).)

Insurance Company May Stop Paying For Cumis Counsel After Withdrawing Its Reservation Of Rights. The trial court granted summary judgment to an insurance company after determining it did not breach its insurance contract with its insured by refusing to pay any attorney fees incurred by the insured's *Cumis* Counsel [*San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, [208 Cal.Rptr. 494] (*Cumis*), after the company withdrew its reservation of rights. The appellate court posed the issue before it as follows: "An insurer agrees to provide a defense with a reservation of rights and approves independent counsel selected by the insured to represent the insured in an underlying tort action, pursuant to *Civil Code* section 2860 and *Cumis*, 162 Cal.App.3d 358, [208 Cal.Rptr. 494]. The insurer subsequently withdraws all reservations of rights and coverage defenses that give rise to the insured's right to *Cumis* counsel. Must the insurer continue to pay the insured's *Cumis* counsel after the insurer's withdrawal of the *Cumis*-triggering reservations eliminated the conflict that created the need for *Cumis* counsel?" The reviewing court answered the question in the negative. (*Swanson v. State*

Farm General Insurance Company (Cal. App. Second Dist., Div. 7; September 23, 2013) 219 Cal.App.4th 1153, [162 Cal. Rptr.3d 477].)

Offset In Medical Malpractice Case. When the plaintiff regained consciousness after surgery to stop nose bleeds, he was blind in one eye. He brought an action against the manufacturer of a device used in the surgery, against the hospital where the surgery was performed and against the doctor who performed the surgery. Plaintiff settled with the manufacturer for \$2 million and with the hospital for \$350,000. Motions for good faith settlements were granted. In the trial against the doctor, a jury awarded plaintiff \$125,000 present cash value for future medical care, \$331,250 for past noneconomic damages and \$993,750 for future noneconomic damages. The court reduced the noneconomic damages to \$250,000 pursuant to *Civil Code* section 3333.2, but, refused to give the doctor an offset of the amounts paid by the settling defendants. The appellate court stated the issue before it as follows: "In this case, we deal with the intersection of three statutes addressing the recovery of damages: *Civil Code* section 3333.2, part of the Medical Injury Compensation Reform Act of 1975 (MICRA), limiting recovery of noneconomic damages for medical malpractice to a total of \$250,000; section 1431.2, part of the Fair Responsibility Act of 1986 adopted by the passage of Proposition 51, which provides that liability for noneconomic damages is several only, in accordance with the percentage of fault; and *Code of Civil Procedure* section 877, which addresses the impact of a good faith settlement on settling and nonsettling tortfeasors." The appeals court concluded: "We find appellant was entitled to an offset as to the economic damages awarded by the jury and to a portion of the noneconomic damages, and reject respondent's constitutional challenges to MICRA." The judgment was modified to reflect an offset against economic damages in the amount of \$125,000 and a reduction of the noneconomic damages to \$16,655. (*Rashidi v. Moser* (Cal. App. Second Dist., Div. 4; September 23, 2013) (As Mod. October 9, 2013) 219 Cal. App.4th 1170, [162 Cal.Rptr.3d 446].)

Court May Defer Sending Fire Claim For An Appraisal.

In a class action brought by victims of fire losses, plaintiffs contend the insurance company followed illegal adjusting practices contrary to *Insurance Code* section 2051, subsection (b), which permits “reasonable deduction for physical depreciation based upon its condition at the time of injury.” As examples, they submitted claims for a 10-year-old set of lead crystal longchamp wine glasses with a replacement value of \$82.13, which the insurance company calculated as having an actual cash value of 82 cents. Similarly, plaintiffs claim a 20-year-old solid walnut china buffet with a replacement cost of \$1,594.32 was calculated as having a cash value of \$15.94 by the insurance company. Their complaint also alleges claims for declaratory relief, unfair competition under *Business and Professions Code* section 17200, breach of contract and bad faith. In the trial court, the insurance company moved to compel an appraisal, which “in an insurance policy constitutes an agreement for contractual arbitration.” The request for an appraisal was denied without prejudice for the insurer to renew its motion later during the litigation, after the trial court decided various legal issues which appraisers may not decide. The appellate court affirmed, finding the trial court has the discretion to defer an appraisal. (*Alexander v. Farmers Insurance Company, Inc.* (Cal. App. Second Dist., Div. 8; September 23, 2013) 219 Cal.App.4th 1183, [162 Cal.Rptr.3d 455].)

Arbitration Award Tossed For Appearance Of Arbitrator Partiality. After an adverse arbitration award in a legal malpractice action, the losing party plaintiff searched the internet for evidence of bias on the part of the arbitrator. She found a link to the arbitrator’s resume, which listed a named partner in the defendant’s law firm as a reference. The trial judge denied a petition to vacate the arbitration award, and the appellate court reversed, stating: “We also conclude that the fact that the arbitrator had listed a partner in JMBM as a reference on his resume reasonably could cause an objective observer to doubt his impartiality as an arbitrator, and his failure to timely disclose that fact compels the conclusion that the arbitration award must be vacated. We therefore

will reverse the judgment with directions to vacate the arbitration award.” (*Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (Cal. App. Second Dist., Div. 3; September 24, 2013) (As Mod. Oct. 21, 2013) 219 Cal.App.4th 1299.)

I Can’t Believe It’s Not Butter.

Plaintiff brought an action against a food manufacturer and a grocery chain for product mislabeling in violation of California Milk and Milk Products Act of 1947 [*Food & Agricultural Code* section 32501; MMPA] alleging products called “spreadable butter” are not butter. Defendants contend the action is preempted by federal food labeling standards. The trial court found plaintiff’s California claims were preempted. Plaintiff requested leave to amend to allege violation the California Sherman Food, Drug and Cosmetic Law [*Health & Safety Code* section 109875; Sherman Law]. The trial court denied leave to amend. The appellate court affirmed, stating: “We conclude that the labeling requirements of the . . . MMPA are not identical to the applicable federal labeling requirements and therefore plaintiff’s claims under the MMPA are preempted; that plaintiff’s mislabeling claims under the . . . Sherman Law are not preempted by federal law; and that the trial court did not abuse its discretion in denying leave to amend to allege claims based on violation of the Sherman Law because, as a matter of law, plaintiff has failed to demonstrate that a reasonable consumer would be misled by the labels on the products.” (*Simpson v. The Kroger Corporation* (Cal. App. Second Dist., Div. 4; September 25, 2013) 219 Cal.App.4th 1352.)

No Retroactivity Of California Rules of Court, Rule 8.278 Amendment. Respondent/defendant borrowed money to deposit with the trial court in lieu of securing an appeal bond. After being successful on appeal, it recovered more than \$200,000 for interest paid on the borrowed funds as a cost of appeal. Those costs were included in an amended judgment from which the current appeal was taken. Despite the fact that *California Rules of Court*, rule 8.278 was recently amended to expressly allow recovery of interest in this situation, the appellate court found no retroactivity, and

ordered the judgment amended by deleting the award of interest. (*Andreini & Company v. MacCorcle Insurance Service* (Cal. App. First Dist., Div. 2; September 25, 2013) 219 Cal.App.4th 1396.)

Shopping For A Friendlier Jurisdiction?

An insured brought an action against its insurance company for bad faith. After spending a substantial amount of time litigating the matter in superior court, the parties stipulated to have their disputes resolved through binding arbitration. The arbitrator found in favor of the insured and awarded \$3,696,414. The insurer filed a petition to vacate the award in the *United States District Court*. The insured filed a motion to confirm in superior court, wherein the insurer filed a motion to stay proceedings pending the federal court’s decision. The superior court denied the stay request and confirmed the award. The insured then filed a motion in federal court requesting it to abstain from hearing the matter. Based on the doctrine of abstention, the federal court closed its case. But that’s not all. The insurer then appealed in state court, contending the trial court abused its discretion. After noting the superior court maintained jurisdiction over the case and was kept itself informed on its progress, the appellate court concluded there was no abuse of discretion. (*Mave Enterprises, Inc. v. The Travelers Indemnity Company of Connecticut* (Cal. App. Second Dist., Div. 1; September 26, 2013) 219 Cal.App.4th 1408.)

Arbitration Agreement Not Unconscionable.

A trial court found an arbitration agreement unconscionable and denied a petition to compel arbitration. The appellate court reversed, finding the failure to attach AAA rules, standing alone, is insufficient grounds to support a finding of procedural unconscionability. With regard to substantive unconscionability, the court said it is not “so one-sided as to ‘shock the conscience.’” (*Peng v. First Republic Bank* (Cal. App. First Dist., Div. 1; September 26, 2013) 219 Cal.App.4th 1462.)

Duty To Defend Despite A Self-Insured Retention Clause.

The issue here involved a Self-Insured Retention [SIR] clause in an insurance policy. The appellate court noted that some insurance policies expressly and unambiguously make payment of a SIR obligation a con-

dition of any obligation under the policy, including the duty to defend. Here, the policy stated in relevant part: “1. *Our total liability for all damages* will not exceed the limits of liability as stated in the Declarations and will apply in excess of the insured’s self-insured retention (the ‘Retained Limit’).” With regard to the duty to defend, the appellate court concluded: “Given the language of the policy, an insured could quite reasonably interpret it as providing a defense to arguably covered claims as soon as such claims are tendered and before any SIR has been paid. Thus, like the trial court, we find the defendant insurer in this equitable subrogation action had a duty to defend its insureds when large soil subsidence claims were made against them and without regard to the SIR provisions in their policies.” (*American Safety Indemnity Company v. Admiral Insurance Company* (Cal. App. Fourth Dist., Div. 1; September 27, 2013) 220 Cal.App.4th 1.)

Employer Argues Delay Resulted In Loss Of Witness. A security guard complained to his employer about not receiving his paychecks and said he would go to “the Labor Board.” He was fired. Over three years later, the Labor Commissioner determined “there is reasonable cause to believe [the employer] violated the *Labor Code*,” and directed the employer to cease and desist retaliation, offer the employee reinstatement to his position, or a similar position, and pay back wages of \$86,094.56. The employer lost its appeal to the Department of Industrial Relations, and the employer petitioned for writ of mandate to command the Labor Commissioner to retract its determination. While the writ was pending, the Labor Commissioner filed a complaint in superior court for injunctive relief to enforce the order. Meanwhile the Labor Commissioner demurred to the writ petition, brushing aside the employer’s argument that *Labor Code* section 98.7, required a determination within 60 days by arguing the deadline was directory, not mandatory. The Labor Commissioner also argued the employer could raise the issue of delay and loss of its witness in the suit to enforce the order. The superior court ordered the writ petition dismissed. The appellate court agreed, concluding the employer could raise its points in defense to

the Labor Commissioner’s action to enforce the order. (*American Corporate Security, Inc. v. Julie Su, as Labor Commissioner* (Cal. App. Third Dist.; September 27, 2013) 220 Cal.App.4th 38, [162 Cal.Rptr.3d 563].)

No Respondeat Superior. An employee was employed by defendant as a directional driller. He had the option of using his personal vehicle or being assigned a company truck and chose the latter. According to defendant, at the time the truck was assigned, his supervisor told him he could use the company vehicle to get to work and back and to run personal errands en route. According to the employee, the supervisor told him he could run errands and take care of business as long as he was back in time for his next shift. Defendant had a written policy, which the employee reviewed, which stated that company vehicles were not to be used for personal business, but could be used to commute between home and work, “and may make a stop directly en route for personal reasons while traveling to and from work.” The employee spent about 50 percent of his time working in Bakersfield, and the other 50 percent in various parts of the state. At one point, he was assigned to work on a rig in Seal Beach for two weeks. After his first Seal Beach shift ended, he used the company pickup to drive back to Bakersfield to spend time with his family. On his way back down to his Seal Beach hotel room, as he began his ascent up the Grapevine, the employee was involved in an accident, and his pickup struck another vehicle, injuring six people. The six injured persons brought an action against defendant, and the trial court granted summary judgment in favor of defendant employer, holding the employee was not acting within the course and scope of his employment at the time of the accident. The appellate court stated: “The employee was not acting within the scope of his employment at the time of the accident; as a result, the requirements for imposing respondeat superior liability cannot be established. Accordingly, we affirm.” (*Halliburton Energy Services, Inc. v. Dept. of Transp.* (Cal. App. Fifth Dist.; September 29, 2013) 220 Cal. App.4th 87, [162 Cal.Rptr.3d 752].)

Criminal Copyright Conviction Vacated. Defendant was convicted of criminal copyright infringement and trafficking in counterfeit labels. The

district court gave the following instruction: “An act is done ‘knowingly’ if the defendant is aware of the act and does not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his act was unlawful.” The Ninth Circuit vacated the conviction, stating: “[Defendant’s] guilt turns on whether he acted ‘willfully’ and ‘knowingly.’ We hold that the term ‘willfully’ requires the government to prove that a defendant knew he was acting illegally rather than simply that he knew he was making copies. Similarly, to ‘knowingly’ traffic in counterfeit labels requires knowledge that the labels were counterfeit.” (*United States of America v. Liu* (Ninth Cir.; October 1, 2013) 731 F.3d 982.)

Child Pornography Found On Computer Taken In For Service. Defendant took his computer to a CompUSA store for service. The technician found images of naked children and adult men, and called the police. Defendant challenges his 96-month sentence on the basis the police had no right to search his computer without a warrant. The Ninth Circuit affirmed his conviction, holding the search was lawful because the police officers who conducted it did not exceed the scope of the permissible search already conducted by a private party. (*United States of America v. Tosti* (Ninth Cir.; October 1, 2013) (Case No. 12-10067).)

Foiled By One Final Judgment Rule. Plaintiff ophthalmologist, who lost her license to practice medicine, brought an action against another doctor for breach of fiduciary duty, among other causes of action. The defendant doctor cross-complained for defamation. The two had previously undertaken a venture to provide medical services to patients of a health maintenance organization and formed a corporation for that purpose. After the loss of plaintiff’s license, defendant and the HMO executed a different agreement. In ruling on a motion in limine, the trial court found “once plaintiff and defendant created a corporation to conduct their business, they owed each other no fiduciary duty.” Plaintiff agreed to dismiss her cause of action for breach of fiduciary duty *with* prejudice, and the two doctors agreed to dismiss their respective defamation claims *without* prejudice to “test

the issue” of fiduciary duty and “get a ruling” from the appellate court before disposing of their defamation claims. The California Supreme Court did not appreciate their creative plan and ruled the “one final judgment rule” precludes an appeal: “When, as here, the trial court has resolved some causes of action and the others are voluntarily dismissed, but the parties have agreed to preserve the voluntarily dismissed counts for potential litigation upon conclusion of the appeal from the judgment rendered, the judgment is one that ‘fails to complete the disposition of all the causes of action between the parties,’ [] and is therefore not appealable.” (*Kurwa v. Kislinger* (Cal. Sup. Ct.; October 3, 2013) 57 Cal.4th 1097, [309 P.3d 838; 162 Cal. Rptr.3d 516].)

No Liability Against County For Injuries Caused By Diseased Tree.

Plaintiff was in a county-owned paved parking lot along the Sacramento River when a cottonwood tree fell on him, resulting in injuries. He brought an action for dangerous condition of public property and the trial court granted summary judgment based upon *Government Code* section 831.2. The appellate court affirmed, stating, “we conclude that [plaintiffs] injuries were ‘caused by’ a ‘natural condition’ of unimproved property where the tree grew, and that fact the tree fell on the improved portion of the public property does not take this case outside the ambit of immunity.” (*Meddock v. County of Yolo* (Cal. App. Third Dist.; October 3, 2013) 220 Cal.App.4th 170, [162 Cal.Rptr.3d 796].)

To Every Action There Is Always Opposed An Equal Reaction-Isaac Newton.

At the time a lawyer was representing plaintiffs in an underlying action against defendants [the plaintiffs in the present action] for RICO violations [18 U.S.C. § 1961], the lawyer issued a press release captioned “FBI SAID TO BE INVESTIGATING GET-FUGU’S CARL FREER,” the defendants his clients were suing. Later, the same lawyer issued the following Tweet: “GetFugu runs an organization for the benefit of its officers and directors, not shareholders and employees. The RICO suit was not frivolous. The 500K lawsuit is frivolous, however, so buyer be wary.” On the same day

the district court dismissed the underlying RICO lawsuit, the present plaintiffs [former defendants] filed the instant action for malicious prosecution and defamation. The lawyer, his firm and other lawyers in the firm, were named as defendants. The lawyer defendants filed a special motion to strike the malicious prosecution/defamation action under *Code of Civil Procedure* section 425.16, which the trial court granted. Finding neither the press release nor the Tweet are shielded by the litigation privilege, and that the Tweet was merely nonactionable opinion, the appellate court affirmed in part but found plaintiffs met their burden to show their defamation claim against two of the attorneys and reversed in part. (*Getfugu, Inc. v. Patton Boggs LLP* (Cal. App. Second Dist., Div. 3; October 3, 2013) 220 Cal.App.4th 141, [162 Cal.Rptr.3d 831].)

Another Malicious Prosecution Followed By AntiSLAPP Motion.

There was an underlying action for fraud, and almost two years later, a malicious prosecution action was filed by a defendant who prevailed earlier. The later action was against the earlier plaintiffs as well as their lawyers. In the malicious prosecution action, one lawyer successfully demurred, citing the statute of limitations set forth in *Code of Civil Procedure* section 340.6. As to the other defendants, the trial court granted their special motion to strike under *Code of Civil Procedure* section 425.16. With regard to the statute of limitations for malicious prosecution against the lawyers, the appeals court affirmed, stating: “the one-year statute of limitations set forth in section 340.6, subdivision (a) applies to a claim for malicious prosecution brought against an attorney that is based on that attorney’s participation in the litigation that forms the basis of the malicious prosecution claim.” Regarding the malicious prosecution claim against the nonlawyer defendants, the appeals court also affirmed, after concluding the plaintiff failed to show a probability of prevailing on the merits of the claim. (*Yee v. Cheung* (Cal. App. Fourth Dist., Div. 1; October 4, 2013) 220 Cal. App.4th 184, [162 Cal.Rptr.3d 851].)

No More Bell Wringing. A former city manager was prosecuted by the

Attorney General and sued civilly for wasting city funds. When requested by the former manager, the city declined to provide the man with a defense. The former city manager brought an action against the city for declaratory relief asking the court for a declaration that the city was required by its employment contract to provide him with a defense. The employment contract states: “City shall defend, hold harmless and indemnify Employee against any claim, demand, judgment or action, of any type or kind, arising out of any act or failure to act, by Employee, if such act or failure to act was within the course and scope of Employee’s employment. City may compromise and settle any such claim or suit provided City shall bear the entire cost of any such settlement.” When the trial court ruled the city was not entitled to a jury trial in the declaratory relief action, the city petitioned the appellate court for a writ of mandate. In its briefing, the city argued that interpreting the former manager’s employment contract to require the city to provide a defense would render the contract void as against public policy, and that the employment contract should be interpreted, as a matter of law, not to require the city to provide a defense. The appellate court asked the parties to brief those issues. The former city manager took the position that if the employment contract is to be interpreted as a matter of law, the trial court was correct in striking the city’s request for a jury trial, and the writ should simply be denied. The appellate court stated: “Such a course of action would, in our view, be a waste of judicial resources. The contract can be interpreted as a matter of law; the parties have been given a full opportunity to brief the issues before this court; and it appears, from the trial court’s ruling on the stay motion, that the trial court’s present interpretation of the contract is erroneous. We will conclude that the contract does not require the City to provide Rizzo with a defense to the underlying actions. We will therefore grant the City’s writ petition, and direct that the trial court conduct no trial, bench or jury.” (*City of Bell v. Sup. Ct. (Robert A. Rizzo)* (Cal. App. Second Dist., Div. 3; October 4, 2013) (As Mod. October 9th and 25th 2013) 220 Cal.App.4th 236.)

The Degree Of Civilization In A Society Can Be Judged By Entering Its Prisons – Fyodor Dostoevsky. After the realignment of California prisons, the State of California contended it was absolved of previous requirements for violations of the rights of disabled inmates. The federal district court rejected the argument and ordered renewal of negotiations. Obviously frustrated with the present situation, the first paragraph of the Ninth Circuit’s opinion reads: “Since 1994, disabled state prisoners and parolees have been engaged in a seemingly never-ending struggle with California state officials over whether defendants must provide disability accommodations under the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act. These accommodations include basic necessities of life for disabled prisoners and parolees, such as wheelchairs, sign language interpreters, accessible beds and toilets, and tapping canes for the blind. Notwithstanding a series of careful district court orders dating back to 1996 and an opinion by this Court affirming the issuance of a permanent injunction, defendants have resisted complying with their federal obligations at every turn. These appeals provide no exception. Defendants contend that a narrow portion of the class of disabled state prisoners and parolees is no longer eligible to benefit from the district court’s remedial orders due to a change in *California Penal Code* section 3056. We reject that contention and affirm the district court’s latest enforcement orders.” The Ninth Circuit affirmed the remedial order of the district court. (*Armstrong v. Brown* (Ninth Cir.; October 4, 2013) 732 F.3d 955.)

Section 998 Acceptance.

Plaintiff did not accept a pretrial settlement offer and did not obtain a more favorable judgment at trial. Defendant insurance company appealed from a postjudgment order denying the *Code of Civil Procedure* section 998, expert witness fees under it incurred in successfully defendant against plaintiff’s claims. The trial court denied the fees because the offer did not comply with the statute’s provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Defendant’s pretrial offer directed plaintiff to file an Offer and Notice of Ac-

ceptance with the trial court if they accepted the offer. The appellate court reversed, stating: “The statute merely requires the section 998 offer to identify a manner of acceptance that complies with the statute’s additional requirement of a signed acceptance by the party or its counsel.” (*Lars Rouland v. Pacific Specialty Ins. Co.* (Cal. App. Fourth Dist., Div. 3; October 7, 2013) 220 Cal.App.4th 280, [162 Cal.Rptr.3d 887].)

Sometimes You Just Gotta Ask.

Plaintiff was injured in a collision and filed suit three and a half months later. Liability against the insured defendant was clear. Seven months after the collision, plaintiff provided medical records to the insurance company. Four months after that, the insurer tendered its policy limits of \$100,000. Two years after that, after a bench trial, judgment against the insured was entered for \$5.9 million. The insured defendant declared bankruptcy, and the bankruptcy trustee assigned to plaintiff any potential rights the insured had against her insurance company. Plaintiff filed suit in the instant action against the underlying defendant’s insurance company for bad faith failure to settle. The insurance company filed a motion for summary judgment; the sole basis of the motion was that plaintiff could not prove bad faith because plaintiff never made a demand for settlement within the policy limits. The trial court granted summary judgment in favor of the insurance company. The appellate court affirmed, stating: “An insurer’s duty to settle is not precipitated solely by the likelihood of an excess judgment against the insured. In the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, we find there is no liability for bad faith failure to settle.” (*Reid v. Mercury Ins. Co.* (Cal. App. Second Dist., Div. 8; October 7, 2013) (As Mod. November 6, 2013) 220 Cal.App.4th 262, [162 Cal.Rptr.3d 894].)

Spare The Rod And Spoil The Child?

The mother of a 12-year-old girl was reported for child abuse after she spanked her daughter, using a wooden spoon with enough force to produce visible bruises. Social Services “substantiated” the report and submitted it to the Department of Justice for inclusion in the Child Abuse

Central Index [CACI] under the Child Abuse and Neglect Reporting Act [*Penal Code* section 11164, *et seq.*] On appeal, the mother contended that neither Social Services nor the Superior Court gave sufficient weight, or any weight, to the right of a parent to impose reasonable discipline on a child. The appellate court found the hearing officer committed a palpable and prejudicial abuse of discretion by refusing to permit Daughter to testify, and concluded: “We will therefore reverse the judgment of the superior court with directions to order [Social Services] to either conduct a new hearing or set aside its finding that the report is ‘substantiated’ and to inform the Department of Justice that the report is ‘unfounded.’” (*Gonzalez v. Santa Clara County Department of Social Services* (Cal. App. Sixth Dist.; October 8, 2013) 220 Cal.App.4th 326, [163 Cal.Rptr.3d 110].)

Case Of Guantanamo Bay Detainee Dismissed.

Plaintiff, a citizen of Sudan, alleged he was detained in Pakistan in 2002 by Pakistani security forces acting under the direction of an unknown American official. He claimed he was transferred to United States Military custody, first at Bagram Airfield in Afghanistan and then at Guantanamo Bay. In 2005, it was determined that, while he was still a threat to the U.S., he was eligible to be transferred to Sudan, which he was. In 2010, he filed an action for money damages in federal court against 22 American officials. For various reasons, the district court dismissed all of his claims. The Ninth Circuit concluded there was no subject matter jurisdiction and vacated the district court’s orders, and remanded with instructions to dismiss the action for lack of subject matter jurisdiction. (*Hamad v. Robert Gates* (Ninth Cir.; October 7, 2013) 732 F.3d 990.)

Woman Told To Find A Bush To Relieve Herself.

Plaintiff, one of the woman workers on a construction project, filed a complaint for discrimination, harassment and retaliation pursuant to the Fair Employment and Housing Act [FEHA; *Government Code* section 12940, *et seq.*]. While working on the site, she often had to travel “miles from the work area” to access portable toilets. Also, the foreman frequently did not take the toilets for pumping

and cleaning, leaving them in an unsanitary condition. She asked her foreman, the day shift supervisor, the night shift supervisor, the safety officer and the project manager to resolve the toilet problem. They disregarded her repeated requests. One time, the foreman told her “to go find a bush.” On arriving at the job site on the morning of January 18, 2008, plaintiff opened the door to the women’s portable toilet and saw feces smeared all over the toilet seat and a pornographic magazine placed on the toilet paper dispenser. The magazine displayed photographs of obese women engaged in sexual acts. Plaintiff believed the feces and demeaning magazine were left in the portable toilet for her in retaliation for her complaints about the portable toilets. The incident was reported to several persons in charge, but plaintiff never learned what, if any, action was taken. Thereafter, other crew members would not speak to plaintiff. In February, plaintiff filed a complaint with Cal-OSHA, and told the project’s EEO officer she feared losing her job because of the complaint. In March, plaintiff was laid off. Defendant’s motion for summary judgment was denied, but its motion for summary adjudication of plaintiff’s punitive damages allegation was granted “because no officer, director or managing agent of [defendant] engaged in or ratified any oppressive, malicious and/or fraudulent conduct against [her].” In his declaration in support of the punitive damages motion, the project manager stated: “I am not an officer or a director of [defendant]. . . I have never drafted a corporate policy or had substantial discretionary authority over decisions that ultimately determine [defendant’s] corporate policy. The only role that I play with respect to [defendant’s] anti-harassment and EEO policies is to ensure that they are followed on the job.” The EEO officer’s declaration stated: “As a [employee of defendant], I have never had substantial discretion authority over decisions that ultimately determine defendant’s corporate policy. I do not write or recommend implementation of any human resources policies and procedures.” A jury found in favor of plaintiff on her FEHA claim and judgment was entered for \$270,000. On appeal, plaintiff challenged the court’s order granting defendant’s SAI to strike her claim for punitive damages. The appellate court reversed the judgment “to the extent it denied [plaintiff’s] claim for

punitive damages,” finding there were triable issues of material fact whether the project manager and/or defendant’s EEO officer were managing agents of defendant. (*Davis v. Kiewit Pacific Co.* (Cal. App. Fourth Dist., Div. 1; October 8, 2013) 220 Cal.App.4th 358, [162 Cal.Rptr.3d 805].)

Preliminary Fact Of Agency Not Established. A lawyer, defense counsel in a criminal trial, filed a writ of prohibition challenging the superior court’s adjudication of contempt against her. The lawyer failed to answer questions regarding how she came into possession of evidence relevant to the prosecution of her client. The lawyer contends the evidence was delivered to her in some way by her client’s agents, thus the circumstances of the delivery are protected by the attorney-client privilege. The appellate court stated the matter “presents a novel argument whereby she contends a prima facie showing of the existence of a privilege can be satisfied by an attorney representing to the court that she received evidence through the defendant’s agent or agents.” The appellate court noted the lawyer presented almost no evidence on the existence of agency, which is generally a question of fact. Without the existence of agency, the lawyer’s claim of privilege necessarily fails. In denying the lawyer’s writ, the court stated: “We are mindful that [the lawyer] cannot be compelled to disclose the content of an allegedly privileged communication to allow the court to determine if the privilege exists. However, we are not willing to expand the law of privilege to allow an attorney to claim the privilege exists in an agency situation without proving the preliminary fact of agency.” (*Zimmerman v. Sup. Ct. (The People)* (Cal. App. Fourth Dist., Div. 1; October 8, 2013) 220 Cal. App.4th 389, [163 Cal.Rptr.3d 135].)

Homeowners Association Election Rules Upheld. A homeowners association adopted a rule that prevents a person from seeking a position on its board if the prospective candidate is related by blood or marriage to any current board member or to any candidate for office on the board. A homeowner within the association contended the rule violates his right to nominate himself for the board, a right that he claimed is guaranteed by *Civil Code*

section 1363.03, subsection (a)(3), which states: “a nomination or election procedure shall not be deemed reasonable if it disallows any member of the Association from nominating himself or herself to the board of directors.” A lawsuit ensued, and the trial court issued judgment in favor of the association after declaring the relationship rule may be enforced. The appellate court affirmed, stating: “We agree with the trial court’s conclusions of law that the relationship rule is valid, enforceable and not inconsistent with the governing documents.” (*Friars Village Homeowners Association v. Hansing* (Cal. App. Fourth Dist., Div. 1; October 9, 2013) 220 Cal.App.4th 405, [162 Cal.Rptr.3d 818].)

Public/Private Agreements & Attorney Fees. Plaintiff is a health care district is a public agency established in 1948 pursuant to the *Health and Safety Code*. Defendants include one of the hospitals that was operated by the district prior to 1998 as well as a nonprofit corporation formed to operate the hospital for the district. In 2004, when defendant hospital faced closure due to seismic requirements, the district entered into an agreement with the nonprofit corporation to construct a new hospital. In 2006, the nonprofit notified the district it would not build the new hospital, and the district claimed there was an anticipatory breach. A series of related agreements ensued. A lawsuit followed and was stayed pending arbitration. The district lost, but the arbitrator did not rule on the issue of whether any of the many agreements had been created in violation of *Government Code* section 1090, as claimed by the district. That statute provides in relevant part: “Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Where a prohibited interest is found, the affected contract is void from its inception. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646, fn. 15, [699 P.2d 316, 323, 214 Cal.Rptr. 139, 146].) The superior court denied defendant’s request for attorney fees, finding the action was not “on a contract” for purposes of *Civil Code* section 1717. The appellate court reversed, finding that

since the district elected to proceed with its contractual invalidation theory under *Government Code* section 1090 regarding some of the agreements, the agreements' attorney fee clauses were put in play. The appellate court concluded: "Having failed in its attempt to prove that the 2008 Agreements are void, the District is now liable for EMC's attorney fees under section 1717." (*Eden Township Healthcare District v. Eden Medical Center* (Cal. App. First Dist., Div. 1; October 9, 2013) 220 Cal.App.4th 418, [162 Cal.Rptr.3d 932].)

Freedom Of Information Act Doesn't Cover Everything.

Plaintiff is in the real estate business. After the U.S. Department of Housing and Urban Development [HUD] received complaints that plaintiff violated the law, plaintiff requested the names of the complainants under the Freedom of Information Act. HUD and the federal trial court invoked Exemption 6 of the Act, and redacted the names of the complainants from the documents requested. Exemption 6, of the Freedom of Information Act, [5 U.S.C. § 552], exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Ninth Circuit affirmed. (*Prudential Locations LLC v. U.S. Dept. of Housing and Urban Development* (Ninth Cir.; October 9, 2013) (Case No. 09-16995).)

Equitable Tolling Available Under The Federal Tort Claims Act.

There is a conflict among the federal circuit courts whether the timing of suits against the United States government is jurisdictional or subject to equitable tolling. The Ninth Circuit joined with several other circuits in concluding 28 U.S.C. § 2401(b) is subject to equitable tolling under some circumstances. In the instant matter, the Ninth Circuit noted the late filing "was not the consequence of any fault or lack of diligence" on the part of the plaintiff. (*Wong v. Beebe; United States of America* (Ninth Cir.; October 9, 2013) 732 F.3d 1030.)

Insurance Company Would Not Reveal Policy Limits.

Plaintiff lost his leg in an automobile accident. In his action against defendant, he asked defendant's insurer for the amount of the policy limits on three separate occasions.

When the insurance company did not respond to the queries, plaintiff made an offer pursuant to *Code of Civil Procedure* section 998, to settle in the amount of \$700,000. The insurance company responded with an offer to settle for \$100,000. A jury awarded plaintiff \$2,339,657, and plaintiff sought an additional \$1,639,451.14 for costs. When the insurance company moved to tax costs, it argued the *Code of Civil Procedure* section 998, offer was not made in good faith. The trial court awarded plaintiff's costs, minus less than \$6,000 which was taxed. The appellate court affirmed, concluding the trial court did not abuse its discretion. (*Aguilar v. Gostischef (Farmers Insurance Exchange)* (Cal. App. Second Dist., Div. 8; October 11, 2013) 220 Cal. App.4th 475, [163 Cal.Rptr.3d 187].)

Restriction In 1946 Deed Enforceable As A Covenant Running With The Land.

In 1945, a woman purchased a parcel of real property described as "Lot 4." In 1946, she conveyed a portion of Lot 4 by a grant deed, which provided that she was conveying "[a]ll of Lot 4 EXCEPTING the following described property in Block 'I'" The deed then set forth the legal description of the portion of Lot 4 that the woman retained. Under the heading "Restriction," the deed stated: "A consideration of this sale is that no buildings will be erected now or at any future date on the [property retained]." In 1989, plaintiffs purchased from successors in interest of the woman the portion of Lot 4 that she retained as well as some adjacent property. In 2010, defendants obtained title to the rest of Lot 4 [the portion which had not been retained by the woman in 1946]. In the present action, plaintiffs want their title quieted and declared free of the building restriction contained in the 1946 grant deed. Both plaintiffs and defendants filed motions for summary judgment. The trial court granted plaintiffs' motion, concluding the building restriction "is not a covenant running with the land, an equitable servitude, or a negative easement." Upon concluding the restriction is an enforceable covenant running with the land under *Civil Code* section 1462, the appellate court reversed with directions to enter judgment in favor of defendants. (*Self v. Shanafi* (Cal. App. First Dist., Div. 1; October 11, 2013) 220 Cal.App.4th 483, [163 Cal.Rptr.3d 71].)

Uniform Trade Secrets Act Did Not Displace Other Causes Of Action.

A former employee worked for plaintiff, a nationwide linen supply company for many years. He promised he would not, during his employment, "become interested, directly or indirectly, as a partner, officer, director, stockholder, advisor, employee, independent contractor or in any other form or capacity, in any other business similar to Company's business." While he was still employed, he prepared a business plan for a joint venture to go into competition with his employer. The joint venture was abandoned, but a board member of the company that abandoned the joint venture used plaintiff's former employee's business plan to form a competing company. Plaintiff brought an action on a variety of theories, including unfair competition and violation of the Uniform Trade Secrets Act [*Civil Code* section 3426; UTSA]. The trial court granted defendants' summary adjudication of all non-UTSA claims, and a jury found that none of the information allegedly appropriated was a trade secret within the meaning of UTSA. The appellate court reversed, stating: "The breach of contract and breach of fiduciary duty theories advanced by the plaintiff do not depend on any misappropriation of trade secrets and therefore are not displaced by UTSA. Those theories also independently support the plaintiff's related claims for statutory and common law unfair competition and interference with business relations." (*Angelica Textile Services, Inc. v. Jaye Park* (Cal. App. Fourth Dist., Div. 1; October 15, 2013) (As mod., October 29, and November 7, 2013) 220 Cal.App.4th 495, [163 Cal.Rptr.3d 192].)

No Showing Thief Ever Read Private Medical Information.

The chief security officer at UCLA's school of medicine advised certain patients that an encrypted external hard drive containing some of their personally identifiable medical information, as well as the computer password, had been stolen in a home invasion robbery. A class action seeking damages pursuant to the Confidentiality of Medical Information Act [*Civil Code* section 56; CMIA] was filed. The Regents demurred, and the trial court overruled it, ruling a damage claim based on a health care provider's

negligent maintenance or storage of an individual's medical information may be stated. The Regents sought extraordinary relief, and the appellate court granted the petition, concluding: "Because [plaintiff] cannot allege her information was improperly viewed or otherwise accessed, we grant the Regent's petition and issue a writ of mandate to the superior court directing it to vacate its order overruling the Regents' demurrer and to enter a new order sustaining the demurrer without leave to amend and dismissing the action." (*The Regents of the University of California v. Sup. Ct. (Melinda Platter)* (Cal. App. Second Dist., Div. 7; October 15, 2013) (As mod., November 11, 2013) 220 Cal.App.4th 549, [163 Cal.Rptr.3d 205].)

Arbitration Agreement In Collective Bargaining Agreement Does Not Apply To Plaintiff's Statutory Discrimination Claims.

Plaintiff, a member of a union, worked for defendant as a nurse assistant from when she was 45 years old until she was 66 years old when she developed a medical condition. Her doctor wrote a note stating she needed to stay off work for a few weeks. Plaintiff was terminated from her employment. She brought an action alleging common law and statutory claims. The collective bargaining agreement contained an arbitration provision. The trial court denied defendant's petition to compel arbitration. In affirming the trial court's order, the appellate court stated: "Because the collective bargaining agreement did not clearly and unmistakably refer [plaintiff's] statutory discrimination claims to arbitration, the trial court properly denied [defendant's] motion to compel arbitration of those claims. With respect to [plaintiff's] common law claims, [defendant] has not presented any legal argument that the trial court's denial [] was erroneous. We therefore deem any claim of error forfeited." (*Mendez v. Mid-Wilshire Health Care Center* (Cal. App. Second Dist., Div. 7; October 15, 2013) 220 Cal.App.4th 534, [163 Cal.Rptr.3d 80].)

California Highway Patrol Not A Special Employer Of Freeway Tow Truck Driver.

A tow truck driver who contracted with a county, part of the California Highway Patrol Freeway Service Patrol [FSP program],

collided with a car, injuring the driver and her infant son. The CHP moved for summary judgment in the subsequent lawsuit on the ground it was not the tow truck driver's special employer and therefore not responsible for his negligence. The trial court denied summary judgment and the CHP petitioned the Court of Appeal for extraordinary relief, based on the legislative intent behind the FSP program. After concluding there was no legislative intent to make the CHP liable as a special employer of FSP tow truck drivers, the appellate court granted a peremptory writ of mandate. (*State of California ex rel. Department of California Highway Patrol v. Sup. Ct. (Mayra Antonia Alvarado)* (Cal. App. Fourth Dist., Div. 3; October 15, 2013) 220 Cal.App.4th 612.)

ADR Spotlight

Recent Legislative Developments

Under current law, out-of-state attorneys and foreign attorneys who are not licensed to practice in the State of California are prohibited from acting as party representatives in international arbitrations seated in California. SB624 would change the California International Arbitration and Conciliation Act to permit complete freedom of representation in international arbitrations held in California. SB624, which is currently is pending in the Senate Rules Committee, would not change existing law with respect to domestic arbitrations in California, under which out-of-state attorneys may represent clients in California arbitrations if they obtain permission from the arbitral tribunal and pay a fee to the California State Bar. Foreign attorneys, who are not licensed to practice in California, are prohibited from representing clients in California domestic arbitrations.

The Lawyer's Guide to Drafting ADR Clauses

The Publication "Lawyer's Guide to Drafting ADR Clauses" (Current as of May 30, 2012) is available free on-line to all members of the Litigation Section. [Click Here](#). The Guide includes advice on how to draft arbitration agreements in light of recent California and United States Supreme Court Decisions. For example, applying the principles of procedural and substantive unconscionability, in *Discover Bank v Superior Court* (2005) 36 Cal.4th 148, 162-163,

[113 P.3d 1100; 30 Cal.Rptr.3d 76], the California Supreme Court had held that a waiver included in a consumer arbitration clause of the right to bring, or participate in, a class action or a class arbitration was unconscionable if disputes between the contracting parties predictably involved small amounts of damages and if the plaintiffs alleged a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money. Recently, however, the United States Supreme Court, in *AT&T Mobility LLC v Concepcion* (2011) 563 U.S.____, [131 S. Ct. 1740; 179 L. Ed. 2d 742]. *Concepcion* held that the so-called Discover Bank rule was preempted by federal law. For more information on the effect of federal law on California arbitration agreements, see Chapter III, Sections 3 and 4 of the [Guide](#).

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